LIBRARY

No. 71-3101

Supreme Court, U.S.
FILED
AUG 31 1971
E. ROBERT SEAVER, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1971

MYRON LYZUN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

KENNETH S. JACOBS
JACOBS and SPENCER
207 South Villa Avenue
Villa Park, Illinois 60181
312-833-1510
Attorneys for Petitioner

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

TABLE OF CONTENTS

PAGE

Citation to Opinion Below 1

Jurisdiction 2

Questions Presented 2

Statement of the Case 3

Reasons for Granting Writ:

Under Rule 19 (1) (b):

An important question of Federal Law has not been but should be settled by this Court:

(1) May a local board void a request for an appeal by reopening a registrant's file on its own motion and issuing a classification other than the lowest requested? 5

The Court of Appeals for the Seventh Circuit has rendered a decision in conflict with the spirit of a decision of this court on the following issue:

(2) Did the procedural errors involved here invalidate the Induction Order which the defendant has been convicted for refusing to obey? 11

The Trial Court and the Seventh Circuit Court of Appeals for the Seventh Circuit have rendered a decision in conflict with the decisions of the First Circuit and the Fifth Circuit on the following matter:

(3) Does the due process clause of the Fifth Amendment of the United States Constitution require a strict jurisdictional concept of Selective Service procedural regulations? 13

Conclusion 14

PAGE

APPENDICES:

A—Opinion of the Seventh Circuit .....App. 1-6

B — Petition for Rehearing Denied .....App. 7

C — Indictment .....App. 8

D — Constitutional Provisions Involved .....App. 9

E — Regulations Involved .....App. 10-13

CITATIONS

Mulloy v. United States, 388 U.S. 410 (1970) 2, 11

United States v. Olvera, 223 F.2d 880 (5th Cir. 1955)..2, 13

United States v. Olkowski, 248 F.Supp. 660 (W.D.Wisc. 1965) 6

United States v. Madrid, 314 F.Supp. 660 (W.D.Tex. 1968) 7, 9, 10, 12

United States v. Derstine, 129 F.Supp. 117 (E.D.Pa. 1954) 7

Tung v. United States, 142 F. 2d 919 (1st Cir. 1944) 2, 7, 13, 14

STATUTES

50 U. S. C. App. Section 462 3

REGULATIONS

PAGE

32 C. F. R. Section 1625.2 9

Section 1625.13 .....5, 8, App. 11

Section 1623.2 .....5, App. 10

Section 1626.4 9

Section 1626.14 .....6, 8, App. 13

Section 1624.1(b) 6, App.10

Section 1626.11 .....7, 12, App. 12

Section 1660.20(a) .....9, App. 11

Section 1626.27 9

Section 1626.31 9

Section 1626.41 .....9, App. 11

UNITED STATES CONSTITUTION

Fifth Amendment .....10, 14, App. 9

In the
Supreme Court of the United States

OCTOBER TERM, 1971

NO.

MYRON LYZUN,

Petitioner,

VS.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Myron Lyzun, prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Seventh Circuit entered on June 10, 1971, Petition for Rehearing denied August 3, 1971.

CITATION TO THE OPINION BELOW

The Opinion of the United States Court of Appeals for the Seventh Circuit printed in the Appendix, infra, Appendix page 1, is unreported at the present.

JURISDICTION

The Opinion and Judgment of the Court of Appeals of the Seventh Circuit was entered on June 10, 1971. A timely Petition for Rehearing was filed on June 25, 1971. The Petition for Rehearing was denied on August 3, 1971. This Petition for Writ of Certiorari will be timely filed on or before September 2, 1971.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

(1) The lower court has decided an important question of Federal law which has not been but should be settled by this Court, that is, may a local board void a request for an appeal by reopening a registrant's file on its own motion and issuing a classification other than the lowest requested?

(2) The trial court and the Seventh Circuit Court of Appeals have acted directly contrary to the spirit of the decision of this Court in *Mulloy* v. *United States,* 388 U.S. 410 (1970), by holding that the procedural errors involved here did not invalidate the Induction Order which the defendant has been convicted for refusing to obey.

(3) The trial court and the United States Court of Appeals for the Seventh Circuit, by refusing to adopt a strict jurisdictional concept of Selective Service procedural regulations, has placed the Seventh Circuit in a position of acting directly contrary to the Fifth Circuit (*United States* v. *Olvera,* 223 F. 2d 880 (5th Cir. 1955), and the 1st Cir. (*Chih Chung Tung* v. *United States,* 142 F.2d 919 (1st Cir. 1944).

STATEMENT OF THE CASE

This criminal action is based upon an Indictment which charged the defendant with a violation of 50 U.S.C. App. Sec. 462. Specifically, he was charged with knowingly neglecting, failing, and refusing to obey the order of his local board to proceed to his civilian work assignment at Elgin State Hospital, Elgin, Illinois.

As Mr. Lyzun noted on his original Classification Questionnaire, SSS Form No. 100, he was a duly ordained minister of Jehovah's Witnesses, and a conscientious objector to war in any form. The Board ignored both of these assertions, failed to send the registrant a conscientious objector form, and on March 18, 1964, classified him 1-A. After being found physically acceptable, he was ordered to report for induction on October 18, 1965. This induction was refused.

Thereafter, the State Director notified the Local Board of their error in not supplying Mr. Lyzun with a conscientious objector form, SSS Form No. 150, and he ordered the classification to be reopened and considered anew in order to afford the Registrant his rights to a personal appearance and an appeal. Mr. Lyzun completed the form, including information concerning his ministerial status, and returned it to the Board on March 4, 1966. The following month, on April 6, 1966, Mr. Lyzun wrote to the Local Board requesting an opportunity for a personal appearance in order to prove that he should be classified "a conscientious objector and/or minister".

Mr. Lyzun subsequently met with the Local Board, and they considered in detail his request for a ministerial classification. The meeting was exclusively devoted to the Registrant's ministerial claim, and the special form for Illinois registrants claiming a ministerial deferment was completed

at this time. The Local Board, however, rejected his claim for a IV-D Classification, and retained him in the 1-A Classification.

The Registrant then filed a written request for an appeal. In his letter he requested a hearing with the Appeal Board since the Local Board had rejected his plea. He specifically stated that he was appealing his last classification by the Local Board, and that his feelings had not changed.

Rather than forward his file to the Appeal Board, however, the Local Board reopened Mr. Lyzun's classification on May 17, 1967, and reclassified him 1-O. The file was not forwarded after the reclassification, and the question of the requested IV-D has, therefore, never been reviewed by the Appeal Board.

Thereafter, the Local Board processed Mr. Lyzun for the Civilian Work Order which he has subsequently been convicted for refusing to obey.

The Petitioner contends that upon the trial, and upon the termination of the appeal in this cause, that the respective courts erred in not sustaining the Motion for Judgment of Acquittal, or reversing the Judgment of conviction, since the purported Civilian Work Order had been voided by the following instances of procedural irregularity:

(1) The Local Board failed to process the Registrant's appeal pursuant to applicable Selective Service Regulations.

(2) The Local Board had no authority to reopen the Registrant's file, and to reclassify the Registrant 1-O.

(3) Neither the Local Board nor any Selective Service Regulation provided notice to the Registrant that a reclassification would void a previously filed appeal request.

REASONS FOR GRANTING WRIT

I.

THE LOWER COURT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT, THAT IS, MAY A LOCAL BOARD VOID A REQUEST FOR AN APPEAL BY REOPENING A REGISTRANT'S FILE ON ITS OWN MOTION AND ISSUING A CLASSIFICATION OTHER THAN THE LOWEST REQUESTED?

The Local Board rejected Mr. Lyzun's request to be classified "A conscientious objector and/or minister," and reclassified him 1-A after granting him a personal appearance. It is clear from the Selective Service Regulations, 32 CFR Section 1625.13, that "each such classification shall be followed by the same right of appearance before the Local Board and the same right of appeal as in the case of an original classification."

After receiving his new 1-A Classification, Mr. Lyzun sought to exercise his right to a hearing before the Appeal Board. It should have been very clear that the defendant was seeking a IV-D Classification since he wrote asking for "an appeal on my last classification." His last classification was that issued after the April 27, 1967 personal appearance, at which only his IV-D claim was discussed. But even if he did not mention the specific classification sought, it is clear that the Local Board at this point became obligated to forward the Registrant's file to the Appeal Board who would make a de novo review, consider each contention advanced by the Registrant, and then classify the Registrant "in the lowest class for which he (was) determined eligible." 32 CFR Section 1623.2.

The Local Board's duty to forward the Registrant's file upon a request for an appeal arises from the following provisions of 32 CFR Section 1626.13:

> "(a) *Immediately* upon an appeal being taken to the Appeal Board by a person entitled to appeal, the local board *shall* prepare the individual appeal record (SSS Form No. 120) in duplicate . . . "
>
> (b) The file of a registrant who appeals or on whose behalf an appeal is taken *shall be forwarded* by the local board to the Appeal Board . . . " (Emphasis added)

And 32 CFR Section 1626.14:

> "The registrant's file *shall be forwarded* to the Appeal Board, or appropriate panel thereof, *immediately* after the period provided in Section 1626.2(c) for taking an appeal has elapsed and the local board has complied with the provisions of Section 1626.13, *but in no event shall the file be forwarded later than five days after* the period for taking an appeal has elapsed." (Emphasis added.)

The courts have recognized that in order to guarantee registrants a consistent interpretation of Selective Service Regulations, particularly in light of the fact that representation by counsel is specifically forbidden, 32 CFR Section 1624.1(b), the local boards must adhere to a strict jurisdictional conception of the law. Thus, in *United States* v. *Olkowski,* 248 F.Supp. 660 (W.D. Wisc., 1965), the Court adopted the position that there was a mandatory duty to forward a registrant's file upon request for an appeal. In that case, the local board wrote to the registrant requesting elucidation on his request for an appeal and was informed that the registrant did not wish to have the Appeal Board review his file. The Court held that this improvisation of a request for clarification did not cure the initial failure of not forwarding the file and did not adequately apprise the defendant of his rights.

Similarly, in *United States* v. *Madrid,* 314 F.Supp. 660 (W.D. Tex., 1968), the Court held as follows:

> "When an appeal is filed, the appeal sections of the Regulations (Sections 1626.1-1626.61) automatically set in motion certain mandatory procedures to be followed by the Selective Service System, and the local board is given no authority by Section 1625.2(b), or any other regulation found by or cited to this Court, to circumvent or thwart a registrant's right to pursue his administrative remedies uninterruptedly to the end."

The position was also adopted in *Tung* v. *United States,* 142 F.2d 919 (1st Cir. 1944) as cited in *United States* v. *Madrid, supra*:

> "A registrant has a right to pursue his administrative remedies uninterruptedly to the end, and that as a necessary consequence an order to report for induction while an appeal is pending in the system is void and need not be obeyed."

Furthermore, in *United States* v. *Derstine,* 129 F.Supp. 117 (E.D. Pa., 1954) the Court held that a registrant's request to a local board, no matter how ambiguous or unclear, should, if it indicates in any way a desire for a procedural right, be construed in favor of the registrant and the right granted.

The obvious thrust of these decisions is that the rights of an individual registrant should not be lost in a regulatory quagmire. If a registrant makes a reasonable attempt to communicate a desire for a procedural right, the local board should not hesitate to grant that request. Indeed, such an interpretation is perfectly consistent with the congressional intentions expressed in 32 CFR 1626.11. Here it is stated that a request for an appeal "need not be in any particular form" and that "the language of any such notice shall be liberally construed in favor of the person filing the notice so as to permit the appeal."

In the case at hand, Mr. Lyzun clearly made known his desire to have his request for a IV-D heard by the Appeal Board.

1. On Selective Service System Form 100 Mr. Lyzun stated that he was a minister of Jehovah's Witnesses and was preparing for the ministry under the direction of the Watchtower Bible & Tract Society.
2. He requested a personal appearance to show positive proof that he should be classified 1-O and IV-D.
3. He completed the form for Illinois registrants claiming ministerial status.
4. He appealed from the Local Board's decision to reclassify him 1-A after a personal appearance at which only the registrant's IV-D claim was discussed.

But the Local Board blatantly ignored Mr. Lyzun's express desire to have his claim heard by the Appeal Board. Instead of forwarding his file as required by the mandate of 32 CFR Section 1626.13 and 14 the Local Board proceeded in a wholly unauthorized manner to reopen the Registrant's file and to reclassify him 1-O.

The defendant's reclassification took place on May 18, 1969. If the Local Board had followed its own regulations Mr. Lyzun's file would have been forwarded to the Appeal Board by at least May 13, 1969. 32 CFR Section 1624.14 provides that "in no event shall the file be forwarded later than five days after the period for taking an appeal has elapsed." The Court of Appeals has held that the last day for taking an appeal was May 8, 1969. Therefore, Mr. Lyzun's file should have been forwarded by May 13, 1969. But the Local Board failed to forward the file as provided for in the Regulations, and instead reopened the classification ten days after the time for appeal had elapsed.

The Local Board's failure to follow the prescribed method of processing the appeal in this case has proven to be extremely prejudicial to the defendant. Had the Board forwarded the file as required, Mr. Lyzun would have:

1. Had his claim reviewed by the Appeal Board;
2. Been entitled to notice of the Appeal Board's decision under 32 CFR Section 1626.27 and 1626.31; and
3. Been exempt from any Order to Report for Civilian Work under the terms of 32 CFR, Section 1660.20 (a) and 1626.41.[1]

But the Local Board did not follow the procedures authorized by Congress. Instead, they reopened Mr. Lyzun's file on their own motion, and reclassified him 1-O.

The times and conditions governing the reopening of a registrant's file are clearly set out in 32 CFR 1625.2. This regulation authorizes reopening upon the Board's own motion *only* if there have been facts added which were not considered when the Registrant was classified. In the case at hand, the only new information added was the Registrant's letter requesting an appeal. It would be ironic indeed if this letter legitimatized the Board's failure to grant the appeal requested.

The Court in *United States* v. *Madrid, supra,* passed squarely on the exact question at issue here and adopted the following position:

---

[1] 32 CFR 1660.20(a) provides that a 1-O registrant may not be ordered to civilian work if he would not be available for induction had he been a 1-A. 32 CFR 1626.4 provides that a 1-A with an appeal pending is not available for induction.

> "Under a reasonable construction of the regulations it would appear that the local board would have no authority whatever to reopen a registrant's classification, *if an appeal has been taken by him, except perhaps to grant the classification requested.* However, assuming arguendo, that the local board had the right under Section 1625.2(b) of the regulations to reopen and consider anew the defendant's classification upon its own motion, notwithstanding the pendency of the appeal, clearly no action taken by that board which failed to grant the defendant the full relief sought by him in his appeal could serve to interfere with, defeat, or suspend his right to have his appeal ultimately determined de novo by the appeal board." (Emphasis added)

This language of the *Madrid* decision clearly supports the proposition that the Local Board's Order to Report for Civilian Work in this case was voided for the following reasons:

1. The Board failed to acknowledge the defendant's clearly expressed desire for an appeal.
2. The Board failed to process the requested appeal in the manner authorized in the Code of Federal Regulations.
3. The Board acted without any apparent jurisdiction when they reopened the defendant's file to classify him 1-O.

A conviction for a refusal to obey an order issued as a result of the blatant administrative irregularities outlined above constitutes a denial of the due process of law mandated by the Fifth Amendment of the United States Constitution.

II.

THE TRIAL COURT AND THE SEVENTH CIRCUIT COURT OF APPEALS HAVE ACTED DIRECTLY CONTRARY TO THE SPIRIT OF THE DECISION OF THIS COURT IN MULLOY v. UNITED STATES, 388 U.S. 410 (1970) BY HOLDING THAT THE PROCEDURAL ERRORS INVOLVED HERE DID NOT INVALIDATE THE INDUCTION ORDER WHICH THE DEFENDANT HAS BEEN CONVICTED FOR REFUSING TO OBEY.

In *Mulloy* v. *United States,* 388 U.S. 410, 415 (1970) this Court held that an Induction Order was invalidated by the Local Board's refusal to reopen and consider a 1-O claim. The Court agreed that the refusal to reopen denied the Registrant his right to appeal. The Petitioner was, therefore, "wrongly deprived of an essential procedural right, and the Order to Report for Induction was invalid."

In the case at hand, the actions of the Local Board have also had the effect of denying the fundamental right to appeal. The following mental gymnastics would have had to take place before Mr. Lyzun, a draft counselor, or any lawyer would have thought that a second request for an appeal would have been necessary to preserve this right:

1. The regulations governing the processing of an appeal would have to be ignored since they would have led the defendant to believe that his file had already been forwarded.
2. The regulations governing reopening would have had to have been construed so that a request for an appeal would be considered new information.
3. The registrant would have had to read between the lines of the Selective Service Regulations and determine that a reopening voids a previous request for an appeal.

But the defendant here was not able to navigate this maze blocking his appeal. Instead, he assumed his request for an appeal, which he had submitted two weeks before his reclassification, would be processed to its completion in a reasonable manner, consistent with his intentions and Selective Service Regulations. His assumption seemed well warranted in light of the language of 32 CFR Section 1626.11 which seems to put substance before form when the issue of an appeal is at hand. Indeed, the appropriateness of this was recognized by the Court in *United States* v. *Madrid, supra,* where it was stated that:

> "Certainly, Section 1625.13 of the regulations does not require a registrant to take successive appeals from every new classification order entered by the local board while an appeal from an adverse decision on his request for a particular classification is still pending, unless he has in some manner chosen to waive or abandon his appeal. Such is not the case here."

The question immediately arising is did Mr. Lyzun waive his appeal right by not filing anew after receiving his 1-O Classification card? The fact that the Registrant had just filed an appeal request two weeks before his classification, the fact that applicable Selective Service Regulations would suggest that the Local Board would have already forwarded his file on or before May 13, and the fact that reopening was inappropriate since no new information was added, all combine to suggest that under the circumstances it would have been a sheer stroke of luck if the Registrant had decided to file a new request for an appeal as suggested by the lower courts.

But access to such an important procedural right should not turn on luck. And a conviction under these circumstances is certainly inconsistent with Mr. Lyzun's constitutional right to due process of law.

III.

THE TRIAL COURT AND THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, BY REFUSING TO ADOPT A STRICT JURISDICTIONAL CONCEPT OF SELECTIVE PROCEDURAL REGULATIONS, HAS PLACED THE SEVENTH CIRCUIT IN A POSITION OF ACTING DIRECTLY CONTRARY TO THE FIFTH CIRCUIT (UNITED STATES v. OLVERA, 223 F.2d 880, 5TH CIR. 1955) AND THE FIRST CIRCUIT (CHIH CHUNG TUNG v. UNITED STATES, 142 F.2d 919, 1ST CIR. 1944).

In its opinion in this case, the Court of Appeals refused to require a strict construction of Selective Service Regulations. This judicial philosophy is directly opposite that expressed by the Fifth Circuit in the following opinion:

> "It is the essence of the validity of board orders and of the crime of disobeying them that all procedural requirements be strictly and faithfully followed, and that a showing of failure to follow them with such strictness and fidelity will invalidate the order of the local board and a conviction based thereon." *Olvera* v. *United States,* 223 F.2d 880, 882 (5th Cir. 1955).

It is obvious that Federal laws cannot be consistently enforced, and registrants will not be able to correctly determine their duties if this Court does not exercise its supervisory powers to resolve the apparent discrepancy in judicial temperament. Are the draft boards of the Fifth Circuit bound by the letter of the law and those in the Seventh Circuit allowed to improvise? Such a state of affairs is certainly not consistent with Congressional intent.

It seems that if liberality of construction is appropriate at all, the law should be interpreted to favor the registrant. In *Chih Chung Tung* v. *United States,* 142 F.2d 919, 921 (1st Cir. 1944) the Court of the First Circuit adopted this position and stated as follows:

> " . . . It is evident that Congress and the administrative officials in charge of the Selective Service System intended not only to guarantee a right of appeal to registrants but also to permit [persons] to take appeals freely and with a minimum of procedural formality, and that induction should not be ordered while an appeal is pending. Viewed in the spirit of liberality and informality reflected by [32 CFR Section 1626.11 (a)] we think the letter constituted a valid appeal."

Although the Court in *Tung* was concerned with an unclear request for an appeal, the inherent logic of their statement is certainly appropriate to the case at hand. Mr. Lyzun had clearly expressed his desire for an appeal. His requests for such a fundamental procedural right should not be thwarted by applying lax jurisdictional concepts to determine local board authority. Inasmuch as the Seventh Circuit has applied a very strict interpretation of the Selective Service Regulations in regard to the defendant's request for an appeal and applied a loose jurisdictional construction in regard to the local board's duties and authority, it is inconsistent with the judicial philosophy expressed in First and Fifth Circuit decisions.

CONCLUSION

It is respectfully submitted that this Court should issue its Writ of Certiorari in order that it may consider the important questions concerning the construction of the jurisdictional provisions of the Selective Service Regulations, and determine whether the conviction in this case is consistent with the due process of law mandated by the Fifth Amendment of the United States Constitution.

Respectfully submitted,

MYRON LYZUN,
Petitioner
By KENNETH S. JACOBS
His Attorney

APPENDIX

APPENDIX

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

SEPTEMBER TERM, 1970 JANUARY SESSION, 1971

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 17844 vs.

MYRON LYZUN,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.

June 10, 1971

Before KILEY, FAIRCHILD, and PELL, *Circuit Judges.*

FAIRCHILD, *Circuit Judge:* Appellant, Myron Lyzun, was convicted of knowingly failing to report for civilian work as required by an order of his draft board. The order was issued May 22, 1968. The underlying 1-O classification was given him May 18, 1967. Appellant challenges the validity of the order on five grounds, and makes one claim of error upon the trial.

1. *Claim that the local board lost jurisdiction.* At a time when Lyzun was classified 1-A, he requested an oppor-

tunity to show proof that he should be classified as "Conscientious Objector and/or Minister." He was allowed a personal appearance, but the board again classified him 1-A. Lyzun appealed. The board did not forward the file to the appeal board, but gave him the 1-O classification above referred to. The 1-A classification appealed from involved a denial of both a conscientious objector classification and a ministerial classification. The new board action granted the first, but continued denial of the other.

32 CFR §1626.13 and .14 required a local board, after the filing of an appeal, to forward the file to the appeal board. Lyzun claims that when he filed his appeal, the local board lost jurisdiction, so that both the 1-O classification and the order to report for civilian work were void.

The government argues that Lyzun's appeal was late, so that it imposed no duty to forward the file. We disagree.

Under 32 CFR §1626.2(c), then applicable, a registrant had ten days "after the date when the local board mails" the notice, in which to appeal. 32 CFR §1641.6 provides: "The period of days allowed a registrant or other person to perform any act or duty required of him shall be counted as beginning on the day following that in which the notice to him is posted or mailed." Exclusion of the day of mailing is consistent with the common law.[1] Computations made by courts in two cases cited by the government are consistent with this principle.[2]

The board classified Lyzun 1-A April 27, 1967, and notice was mailed April 28. Counting April 29 as the first day of the period allowed for an appeal, May 8 was the tenth.

---

[1] See 86 C.J.S. Time §13(1)ff., p. 848.

[2] *United States* v. *Commanding Officer, etc.* (2d Cir., 1944), 142 F2d 381, 382, and *Frank* v. *United States* (9th Cir., 1956), 236 F2d 39, 42.

Lyzun's appeal was mailed May 8 and received by the board May 9. The administrative practice in the Selective Service System is that when a notice is filed by mail, "the date of mailing as shown by the postmark on the envelope and not the date it was received by the local board shall be used in determining whether the filing or submission was timely."[3]

Thus the local board had the duty under the regulation to forward his file to the appeal board, but the local board failed to comply. Instead it reconsidered and partially reversed its own decision, granted one of the classifications Lyzun had requested, but continued to deny the other. The board again notified Lyzun of his right to appeal, but he did not appeal.

We note here that Lyzun's file is unusual in that information furnished by him makes it clear that he did not meet the statutory requirements as a minister. It appears that he had been a "minister" according to his own lights since his baptism and ordination as a Jehovah's Witness at the age of 12, but the information he supplied thoroughly established that he did not preach and teach the principles of religion as his regular and customary vocation.[4]

The question presented is whether the selective service regulations require application of a strict jurisdictional concept so that the 1-O classification and the order to report for civilian work were wholly void. We think it unreasonable to interpret the regulations as requiring that

---

[3] Local Board Memorandum No. 72.

[4] 50 App. U.S.C. §466 (g).

result in these circumstances. Had Lyzun, after being granted one of the classifications he sought, desired to appeal, either because he thought he might be granted the IV-D classification, or even for the purpose of delay, he could have appealed from the 1-O classification, and was so informed. In our view his failure to appeal ends inquiry into his classification.

We are aware of 32 CFR §1626.41 providing that local boards:

> "shall not issue an order for a registrant to report for induction either during the period afforded the registrant to take an appeal to the appeal board or during the period such appeal is pending. Any order to report for induction which has been issued during either of such periods shall be ineffective and shall be cancelled by the local board."

Literally the regulation does not apply to the type of order involved in this case. Assuming that it did, we think the time during which it would have prevented an order expired with the time for appeal from the 1-O classification.

We also note two decisions holding board orders invalid under somewhat similar facts.[5] In each case, as in ours, an appeal was filed, but not processed to conclusion, the local board again issued a classification, from which the registrant took no appeal, and the board later issued its order. The courts in these two instances followed a strict construction and concluded that the registrant's later opportunity to appeal did not cure the failure of the board to process the earlier appeal properly. In this respect we reach a different conclusion.

---

[5] *United States* v. *Olkowski* (W.D.Wis., 1965), 248 FSupp. 660; *United States* v. *Madrid* (W.D. Texas, 1968), 314 FSupp. 17.

2. *Authority to order an alien to report for civilian work.* Lyzun is a German national, resident in the United States. He concedes that 50 App. U.S.C. §454 and 32 CFR §1622(1)(a)(1) expressly subject a male resident alien to liability for military service, but points out that the act does not specify resident aliens as persons who can be required to perform civilian work. The pertinent portion of the statute, however, 50 App. U.S.C. §456(j), reaches "Any person" who successfully claims conscientious objection, and there is no reason why this term does not include a resident alien who successfully makes the claim.

3. *Formality of board decision on civilian work.* The board file contains a record that on April 11, 1968 Lyzun met with the board and a representative of the state director for the purpose of reaching agreement on the type of civilian work to be performed in lieu of induction. It is recorded that Lyzun refused to accept any of the work suggested and the members of the board determined that they should seek authority of the director to order civilian work at a particular hospital. All four members signed the record, although no vote was entered on the forms where votes are normally recorded. The chairman wrote a letter requesting the authority, and it was granted by letter. The order to report was signed by the chairman. It does not appear that the board met after the authority was received and before the order was issued. We conclude the record shows substantial compliance with applicable requirements.[6]

4. *Assistance of counsel or appeal agent.* Appellant contended at trial and on appeal that due process was denied by the failure of the board to be more aggressive about furnishing an appeal agent. The board did inform

---

[6] *United States* v. *Isenring* (7th Cir., 1969), 419 F2d 975.

him of the availability and the identity of an appeal agent. Failure to do more was not a lack of due process.

On appeal, appellant seeks to broaden his attack, so as to claim, under *United States* v. *Weller* (N.D.Cal., 1969), 309 FSupp. 50, invalidity of 32 CFR §1624.1(b), prohibiting representation by counsel before the local board. There is no suggestion in the record that appellant had or sought counsel or that he desired to have an attorney appear with him before the local board.[7]

5. *Claim under the Thirteenth Amendment.* As appellant concedes, his claim that an order requiring civilian work violates the thirteenth amendment was decided against him by *Holmes* v. *United States* (7th Cir., 1968), 387 F2d 781, 784, cert. den. 391 U.S. 936.

6. *Admissibility of board file.* Appellant's failure to report was proved by letters and entries in the board file. This type of evidence was held admissible in *Holmes, supra.*

The judgment is affirmed.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

---

[7] See *United States* v. *Phifer* (7th Cir., February 17, 1971, No. 18376, page 6, slip opinion).

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Tuesday, August 3, 1971

Before

HON. ROGER J. KILEY, *Circuit Judge*

HON. THOMAS E. FAIRCHILD, *Circuit Judge*

HON. WILBUR F. PELL, JR., *Circuit Judge*

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 17844 vs.

MYRON LYZUN,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.

IT IS ORDERED by the Court that the petition for rehearing filed in the above-entitled cause be, and the same is hereby denied.

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,

-vs-

MYRON LYZUN,

No. 69 CR 310

Violation: Title 50 Appendix, United States Code, Section 462

The MAY 1969 GRAND JURY charges:

On or about June 5, 1968, at Forest Park, in the Northern District of Illinois, Eastern Division,

MYRON LYZUN,

defendant herein, being a male person who was required and did register under the provisions of the Universal Military Training and Service Act, and who duly became a registrant at Local Board No. 108, Forest Park, Illinois, and was duly classified in Class 1-O, and was ordered by said Local Board to report to said local board for the purpose of receiving instructions to proceed to his civilian work assignment, to wit, Elgin State Hospital, Elgin, Illinois, to perform civilian work contributing to the maintenance of the national health, safety, or interest, then and there knowingly did neglect, fail, and refuse to report to Elgin State Hospital; in violation of Universal Military Training and Service Act, Section 462, Title 50 Appendix, United States Code.

A TRUE BILL:

....

United States Attorney FOREMAN

APPENDIX D

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX E

REGULATIONS CITED

§ 1623.2 *Consideration of classes.*

Every registrant shall be placed on Class I-A under the provisions of section 1622.10 of this chapter except that when grounds are established to place a registrant in one or more of the classes listed in the following table, the registrant shall be classified in the lowest class for which he is determined to be eligible, with Class I-A-O considered the highest class and Class I-C considered the lowest class according to the following table:

Class: I-A-O
I-O
I-S
I-Y
II-A
II-C
II-S
I-D
III-A
IV-B
IV-C
IV-D
IV-F
IV-A
V-A
I-W
I-C

§ 1624.1 *Opportunity to appear in person.*

(b) No person other than a registrant shall have the right to appear in person before the local board, but the local board may, in its discretion, permit any person to

appear before it with or on behalf of a registrant: *Provided,* That if the registrant does not speak English adequately he may appear with a person to act as interpreter for him: *And provided further,* That no registrant may be represented before the local board by anyone acting as attorney or legal counsel.

§ 1625.13 *Right of appeal following re-opening of classification.*

Each such classification shall be followed by the same right of appearance before the local board and the same right of appeal as in the case of an original classification.

EFFECT OF APPEAL

§ 1626.41 *Appeal stays induction.*

The local board shall not issue an order for a registrant to report for induction either during the period afforded the registrant to take an appeal to the appeal board or during the period such an appeal is pending. Any order to report for induction which has been issued during either of such periods shall be ineffective and shall be cancelled by the local board. Whenever an appeal to the appeal board has been taken by a person entitled to do so, any order to report for induction which has previously been issued to the registrant shall be ineffective and shall be cancelled by the local board.

§1660.20 *Determination of type of civilian work to be performed and order by the local board to perform such work.*

(a) When a registrant in Class I-O has been found qualified for service in the Armed Forces after his armed forces physical examination or when such a registrant has

failed to report for or to submit to armed forces physical examination, he shall, within ten days after a Statement of Acceptability (DD Form No. 62) has been mailed to him by the local board or within ten days after he has failed to report for or submit to armed forces physical examination, submit to the local board three types of civilian work contributing to the maintenance of the national health, safety, or interest as defined in section 1660.1, which he is qualified to do and which he offers to perform in lieu of induction into the Armed Forces. If the local board deems any one of these types of work to be appropriate, it will order the registrant to perform such work, but such order shall not be issued prior to the time that the registrant would have been ordered to report for induction if he had not been classified in Class I-O, unless he has volunteered for such work.

Procedure for Taking Appeal

§ 1626.11 *How appeal to appeal board is taken.*

(a) Any person entitled to do so may appeal to the appeal board by filing with the local board a written notice of appeal. Such notice need not be in any particular form but must state the name of the registrant and the name and identity of the person appealing so as to show the right of appeal. The language of any such notice shall be liberally construed in favor of the person filing the notice so as to permit the appeal.

(b) Whenever an appeal to the appeal board involves a claim for the occupational deferment of a registrant whose principal place of employment is located outside the appeal board area in which the local board having jurisdiction over the registrant is located and is located in the area of another appeal board, the person appealing may, at the

time he files the notice of appeal, file with the local board a written request that the appeal be submitted to the appeal board having jurisdiction over the area in which is located the principal place of employment of the registrant.

(c) Whenever an appeal to the appeal board involves a registrant whose current place of residence is located outside the appeal board area in which the local board having jurisdiction over the registrant is located and is located in the area of another appeal board and the written request referred to in paragraph (b) of this section has not been filed with the local board, the registrant, the Director of Selective Service, or the State Director of Selective Service may, at the time he files the notice of appeal, file with the local board a written request that the appeal be submitted to the appeal board having jurisdiction over the area in which is located the current place of residence of the registrant.

(d) The local board shall enter on the Classification Questionnaire (SSS Form No. 100) the date on which an appeal is filed, and, if the appeal is taken by any person other than the registrant, the local board shall notify the registrant that an appeal has been taken.

§ 1626.14 *Time when record to be forwarded on appeal.*

The registrant's file shall be forwarded to the appeal board, or appropriate panel thereof, immediately after the period provided in § 1626.2 (c) for taking an appeal has elapsed and the local board has complied with the provisions of § 1626.13, but in no event shall the file be forwarded later than five days after the period for taking an appeal has elapsed. The local board shall enter in the Classification Record (SSS Form No. 102) the date it transmits the registrant's file to the appeal board or appropriate panel thereof.

SUPREME COURT, U. S.
No. 71-39
OCT 6 1971
E. ROBERT SEAVER, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1971

MYRON LYZUN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D. C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-310

MYRON LYZUN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a non-jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of knowingly failing to report for civilian work in lieu of induction, in violation of 50 U.S.C. App. 462(a). He was sentenced to three years' imprisonment. The court of appeals affirmed (Pet. App. A), and, on August 3, 1971, denied a petition for rehearing (Pet. App. B).

The essential facts are not in dispute. Petitioner registered with the local board at the age of eight-

een. In his Classification Questionnaire (SSS Form 100), he indicated that he was a duly ordained minister of the Jehovah's Witnesses and conscientiously opposed to participation in war in any form. The Special Form for Conscientious Objectors (SSS Form 150) was not mailed to petitioner, however; rather, on March 18, 1964, his local board classified him I-A. After being found physically acceptable for military service, petitioner was ordered to report for induction on October 18, 1965; he reported but refused induction.

Thereafter, the State Director notified petitioner's local board that it had erred in failing to furnish petitioner with a conscientious objector form; he ordered the board to mail the form to petitioner and afford petitioner the opportunity to establish his conscientious objector claim. This was done; petitioner completed the form and returned it to the local board on March 4, 1966. On April 6, 1966, he wrote a letter requesting a personal appearance to show proof that he should be classified as "a conscientious objector and/or minister." The board then reopened petitioner's classification and granted him a personal appearance; it also provided him with a special form "for Illinois registrants claiming ministerial status," which petitioner completed and returned.

In the special form, a copy of which is annexed hereto as Appendix A, *infra*, pp. 9-11, petitioner stated that he was a Jehovah's Witness minister, associated with the Watchtower Bible & Tract Society of Pennsylvania; that his church had 174 members, all of whom were ministers; that he had been ordained in

1957 at the age of 12; that he was an "Assistant Bible Study Conductor" and an "Asst.-Literature Servant," and spent "3½ hours" each week "preach[ing] and teach[ing] the principles of religion." Petitioner also indicated in the special form that he worked "60 hrs. weekly" as an "operating engineer" for a construction company.

On April 27, 1967, following petitioner's personal appearance, the board voted unanimously to retain petitioner in Class I-A. He was notified of his appeal rights and, on May 9, 1967, the board received a request for appeal. Instead of forwarding petitioner's file to the State Appeal Board, however, the local board *sua sponte* reopened petitioner's classification and reconsidered his conscientious objector and ministerial claims. On May 18, 1967, it reclassified him I-O; a new notice of classification was mailed to petitioner, together with a letter apprising him of his right to request a personal appearance or to take an appeal from the I-O classification.

Petitioner made no such request, and he was thereafter processed by the local board for a civilian work assignment. On May 22, 1968, he was ordered to report to the board on June 5, 1968, for instructions to proceed to Elgin State Hospital, Elgin, Illinois. Petitioner failed to comply with this order, and the present indictment and conviction followed. The court of appeals affirmed (Pet. App. 1-6).

1. Petitioner objects here, as he did below, to the fact that the local board, on receipt of his appeal request, reopened his I-A classification *sua sponte* and reclassified him I-O, rather than immediately

forwarding his Selective Service file to the State Appeal Board as required by 32 C.F.R. 1626.14.[1] We do not disagree with petitioner that the procedure followed by the board in this case failed to adhere strictly to the regulatory requirements and should not be encouraged. Nevertheless, the court below properly affirmed petitioner's conviction in the peculiar circumstances of this case.

Petitioner had specifically sought exemption from military service as "a conscientious objector and/or minister." When he was denied both claims, he requested an appeal; the local board then undertook on its own initiative to review petitioner's file and proceeded to grant him exemption as a conscientious objector. On being notified of this change in status, and told of his right to appeal the I-O classification, petitioner raised no objection with the board. Consequently, his file was not forwarded to the State Appeal Board.

It is now argued that these procedures deprived the State Appeal Board from making a *de novo* review of petitioner's file and possibly reclassifying him IV-D as a minister. But, the action of the local board did not itself cut off administrative appellate review, as would have been the case had the board refused to reopen. Rather, the decision here to reclassify petitioner I-O specifically afforded him the opportunity to take an administrative appeal, and

---

[1] The regulation provides in pertinent part that "[t]he registrant's file shall be forwarded to the appeal board * * * in no event * * * later than five days after the period for taking an appeal has elapsed."

he was so notified. Having declined to do so, petitioner is now in no position to complain of the failure of the State Appeal Board to consider his ministerial claim. Whatever procedural irregularity might be found in the local board's grant of conscientious objector status, it is clear that petitioner's position thereafter with respect to his administrative appeal rights was no different than it would have been if the board had taken such action originally.

2. Moreover, even if, as petitioner seems to contend (Pet. 12), his failure to request an appeal following the I-O classification can somehow be excused on the ground that he could reasonably assume his earlier appeal from the I-A classification was still pending, petitioner has not suffered any material prejudice resulting from the fact that his ministerial claim was never presented to the State Appeal Board. As pointed out by the court of appeals (Pet. App. 3):

> * * * [petitioner's] file is unusual in that the information furnished by him makes it clear that he did not meet the statutory requirements as a minister. It appears that he had been a "minister" according to his own lights since his baptism and ordination as a Jehovah's Witness at the age of 12, but the information he supplied thoroughly established that he did not preach and teach the principles of religion as his regular and customary vocation. [Footnote omitted.]

In short, it is apparent on this record that petitioner failed to make out a *prima facie* case for a ministerial exemption (see Appendix A, *infra*, pp.

9-11). Plainly, if he had not coupled his request for a IV-D classification with his conscientious objector claim, the local board could have properly refused to reopen under *Mulloy* v. *United States*, 398 U.S. 410. As the *Mulloy* opinion indicates, based on the information petitioner submitted here in his ministerial claim, he was not entitled to *de novo* review by the State Appeal Board. Accordingly, the fact that under the unusual circumstances of this case he never obtained such review is no basis for a claim of prejudice.

3. The instant case is thus significantly different from *United States* v. *Olvera*, 223 F. 2d 880 (C.A. 5), and *Chih Chung Tung* v. *United States*, 142 F. 2d 919 (C.A. 1), on which petitioner places some reliance. In those cases, it was clear on the record that the procedural irregularities were prejudicial to the registrant.[2] Here, the evidence is otherwise; the board's failure to forward petitioner's file promptly to the State Appeal Board, although technically contrary to 32 C.F.R. 1626.14, was of no practical consequence. Petitioner's ministerial claim did not even meet the minimum reopening standard enunciated by this Court in *Mulloy*. In these unique circumstances, there is no reason for further review by this Court. See, *e.g.*, *Knox* v. *United States*, 200 F. 2d 398 (C.A. 9); *Edwards* v. *United States*, 395

---

[2] In *Olvera*, the local board's refusal to reopen was found to be arbitrary and unreasonable since it was made without regard to whether a *prima facie* claim had been submitted. In *Tung*, the error was in ordering the registrant to induction while his administrative appeal was pending.

F. 2d 453 (C.A. 9); *United States* v. *Chaudron*, 425 F. 2d 605 (C.A. 8).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

OCTOBER 1971.

APPENDIX A

SPECIAL INSTRUCTIONS FOR ILLINOIS REGISTRANTS CLAIMING MINISTERIAL CLASSIFICATION OF IV-D

1. Name of Registrant Myron Alex Lyzun
   SSS No. ----------
2. What is the name of the religious organization in which you claim to be a minister? Watchtower Bible & Tract Society of Pennsylvania.
3. What was the date of your affiliation with this religious Organization? 1952.
4. How long of a period of study and preparation did you engage in before you began your ministerial duties? Since 1952.
5. Where did you undertake such training, if any? East Unit, Chicago, Central Unit, Chicago—Maywood.
6. What were the major subjects of study during such training period, if any? The Holy Bible.
7. Did you receive a degree as a result of such training? (a) In liberal Arts? No. (b) In Theology? No. (c) ----------
8. By what ceremony were you ordained, by your church organization to preach and to teach the principles of religion? By Baptism and upon entry into organization. Baptized 11-7-57.
9. Date of ordination 11-7-57.
   (a) Place of ordination Y.M.C.A. Chicago, Ill.
10. What was your age at the time of ordination? 12.

11. What is the location and street address of the church where you preach and teach? 1042 S. 14th Ave., Maywood, Ill.

12. Do you have authority to perform religious ceremonies such as marriages, funerals etc.? Yes.

13. Have you performed such duties? No.

14. What is the number of members of the church unit or congregation in which you preach and teach the principles of religion? 67 & 107.

15. How many of the church members are ministers? 174.

16. How many hours each week do you spend in preaching and teaching the principles of religion? 3½ hours.

17. Does any of this time include time spent in the sale or distribution of religious literature? No.

18. Who is the person in the church to whom you are responsible for the conduct of your church duties and what is this person's official church title? Mat Stich, Congregation Servant.

19. Who is the person in the church to whom your immediate superior is responsible and what is his official church title? Howard Sawalich, Circuit Servant.

20. What, if any, are the unusual or special responsibilities of you in the church, which are in addition to those generally engaged in by all members of your church generally? Assistant Bible Study Conductor, Asst. Literature Servant.

21. How many hours each week do you spend in activities other than in ministerial duties of preaching and teaching the principles of religion? 60 hrs. weekly.

22. What is the nature of such other secular work? Operating Engineer.

23. Who is your secular employer? Sivestri Paving Contractors.

24. Address of employer? Alsip, Ill.

25. What is the total average monthly renumeration (before tax deduction) received by you from such other secular activities? $700.00 to $800.00.

26. What is the total average remuneration (before tax deduction) received by you directly from the ministerial work of preaching and teaching: Nothing.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1971 445865 227